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No. 02-1624

IN THE

# Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, *et al.*,
*Petitioners,*

v.

MICHAEL NEWDOW,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## Brief of Amicus Curiae Mister Thorne in Support of Respondent

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## Interest of Amicus[1]

Amicus curaie's interest in this matter is just this: to encourage the Court to find that the current version of the Pledge of Allegiance, with its affirmation that this is "one nation under God," promotes a particular religious belief, and that the rights of public school students and their parents are violated by any law that requires this belief to be recited daily in public school.

Amicus has pledged to defend the Constitution. When amicus joined the United States Armed Forces during the Viet Nam War, he made the following pledge:

"I DO SOLEMNLY SWEAR THAT I WILL SUPPORT AND DEFEND THE CONSTITUTION OF THE UNITED STATES AGAINST ALL ENEMIES, FOREIGN AND DOMESTIC; THAT I WILL BEAR TRUE FAITH AND ALLEGIANCE TO THE SAME; AND THAT I WILL OBEY THE ORDERS OF THE PRESIDENT OF THE UNITED STATES AND THE ORDERS OF THE OFFICERS APPOINTED OVER ME, ACCORDING TO REGULA ΓIONS AND THE UNIFORM CODE OF MILITARY JUSTICE. SO HELP ME GOD."

This brief is filed in accord with that pledge.

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. The printing of this brief was funded by contributions provided by Chris Lindstrom, Don Harvis, Ormond Otvos, Gene Garman, Fred Kormos, Ellery Schempp, Austin Cline, Gretchen Koch, Ken Ganzer, David Edelstein, Marc Perkel, Kate Talbot, Janaan Abbott, Ken Mischka, and Sidney Schempp.

## Summary of Argument

When this court granted Petitioner's petition for a writ of certiorari in this case, it limited that grant to these two questions:

***1.*** *Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance.*

***2.*** *Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.*

This brief addresses the second question only. It argues that:

The current version of the Pledge of Allegiance contains a statement of religious belief, namely, that the United States is, in some sense, a 'nation under God.'

The current version of the Pledge of Allegiance demonstrates a preference by the United States for one religious belief over all others.

A school district policy that requires the current version of the Pledge of Allegiance to be recited in public school is a policy that requires the affirmation of a religious belief.

A school district policy that requires the current version of the Pledge of Allegiance to be recited in public school is a policy that interferes with the rights of parents to control the religious upbringing of their children.

This brief argues, throughout, that any law, or any school district policy, that requires the current version of the Pledge of Allegiance to be recited in public school violates the Establishment Clause of the First Amendment.



On 14 October 2003, this court invited the Solicitor General of the United States to file a brief in this case. The Solicitor General filed a brief for the United States as Respondent supporting Petitioners (referred to hereafter as U.S. brief).

In that brief, the U.S. argues that the Pledge of Allegiance does not endorse a religious belief. In its brief supporting Petitioners, the U.S. asks the court to consider this: ". . . the reference to God in the Pledge is not reasonably and objectively understood as endorsing . . . any particular religious doctrine."[2] But the U.S. provides nothing to support that claim. It is given as a postulate: not the sort of fact any reasonable person would question.

## What a Child Should Know

At the center of this controversy regarding the Pledge are children, those attending public schools. Consider the children attending school in the Elk Grove Unified School District (hereafter referred to as EGUSD). Like all other public school students in California, those in EGUSD must take the state's Standardized Testing and Reporting (STAR[3]) test each year, grades 2 through 11.[4] The test assesses a student's performance on California's content standards, established by the California State Board of Education, which "sets K-12 education policy in the areas of standards, curriculum, instructional materials and assessment."[5]

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[2] U.S. brief, page 32

[3] See http://star.cde.ca.gov

[4] California Code of Regulations, Title 1, Division 1, Subchapter 3.75, §851(a) School districts shall administer the designated achievement test to each eligible pupil enrolled in any of grades 2 to 11, inclusive, in a school district on the date testing begins in the pupil's school. See also California Education Code, Section 60640(b).

[5] Statement from California State Board of Education. See http://www.cde.ca.gov/board/

According to the content standards, if you attend one of EGUSD's elementary schools, and you do reasonably well, then by the time you complete the sixth grade you know the Law of Trichotomy.

The Law of Trichotomy is taught beginning in Kindergarten, according to *Mathematics Content Standards for California Public Schools*.[6] The law says this, or it can be said in this way:

> Either a box is empty,
> Or it contains one thing,
> Or it contains more than one thing.

Of course, Kindergarten students are not told "this is the Law of Trichotomy." They are taught how to order things, how to say which container contains less, or which circle is bigger. Years later, when they are in high school, that is when they learn this law has a name. For those who go on to college and study set theory, they will see it is really nothing more nor less than Zermelo's Axiom of Choice. It is this idea, or it can be put this way:

> a whole number is either 0, or 1, or greater than 1.

Most people will never study Zermelo's Axiom of Choice, but there is the concept, and we expect elementary school students to learn it early on. And anyone who does not grasp it has not mastered elementary school math.

[6] Adopted by the California State Board of Education, December 1997. See http://www.cde.ca.gov/standards/math/



According to the math content standards, by the end of first grade, a student should be able to express order relations like $0 < 1$ and $2 > 1$. By the end of third grade, a student should also be able to:

- Represent relationships of quantities in the form of mathematical expressions, equations, or inequalities.[7]
- Determine when and how to break a problem into simpler parts.[8]
- Analyze problems by identifying relationships, distinguishing relevant from irrelevant information, sequencing and prioritizing information, and observing patterns.[9]

According to the state's standards for history and language-arts,[10] by the end of third grade, a student should be able to:

- Describe national identities, religious beliefs, customs, and various folklore traditions.[11]
- Distinguish between the speaker's opinions and verifiable facts.[12]
- Determine the reasons for rules, laws, and the U.S. Constitution.[13]

[7] *Mathematics Content Standards for California Public Schools*, page 12 (1997)

[8] *Mathematics Content Standards for California Public Schools*, page 14 (1997)

[9] *Mathematics Content Standards for California Public Schools*, page 14 (1997)

[10] See http://www.cde.ca.gov/standards/history/ (history standards) and http://www.cde.ca.gov/standards/reading/ (language-arts standards)

[11] *History–Social Science Content Standards for California Public Schools*, page 9 (1998)

[12] *English–Language Arts Content Standards for California Public Schools*, page 20 (1997)

According to the state's content standards, by the time a student completes sixth grade, he or she should be able to:

- Write and solve one-step linear equations in one variable.[14]
- Compare different samples of a population with the data from the entire population and identify a situation in which it makes sense to use a sample.[15]
- Estimate unknown quantities graphically and solve for them by using logical reasoning and arithmetic and algebraic techniques.[16]
- Explain the effects of common literary devices (e.g., symbolism, imagery, metaphor) in a variety of fictional and nonfictional texts.[17]
- Describe the government of the Roman Republic and its significance (e.g., written constitution and tripartite government, checks and balances, civic duty).[18]

[13] *History–Social Science Content Standards for California Public Schools*, page 10 (1998)

[14] *Mathematics Content Standards for California Public Schools*, page 25 (1997)

[15] *Mathematics Content Standards for California Public Schools*, page 27 (1997)

[16] *Mathematics Content Standards for California Public Schools*, page 28 (1997)

[17] *English–Language Arts Content Standards for California Public Schools*, page 36 (1997)

[18] *History–Social Science Content Standards for California Public Schools*, page 26 (1998)



- Explain how state constitutions that were established after 1776 embodied the ideals of the American Revolution and helped serve as models for the U.S. Constitution.[19]
- Identify the significance and leaders of the First Great Awakening, which marked a shift in religious ideas, practices, and allegiances in the colonial period, the growth of religious toleration, and free exercise of religion.[20]

Some of the state's standards may seem ambitious, but if you examine them, then you see that a competent sixth-grader can tell you this much:

*If* the current version of the Pledge of Allegiance is:

> *"I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."*

*then* the Pledge asserts each of the following:

- The United States is a nation, and it has a flag.
- The United States is one nation, and it is indivisible.
- The United States is a republic, and the flag stands for that republic.
- The United States is a nation under God, and so there is a god.

[19] *History–Social Science Content Standards for California Public Schools*, page 19 (1998)

[20] *History–Social Science Content Standards for California Public Schools*, page 18 (1998)

Such a competent sixth-grader can also tell you this. Of these three statements, *if* one is true, *then* the others are false:

***P0***: There are no gods
***P1***: There is only one god
***P2***: There are many gods

By the time a student reaches sixth grade, he or she has, most likely, already decided which of those statements (P0, P1, or P2) is correct. (Years before the student ever hears about Peano's Postulates, or the Fundamental Theorem of Arithmetic.) That aside, a competent sixth-grader can tell you that *if* one of the statements is true, *then* the other two are false. It's as simple as that. *If* what the Pledge says is true, *then* P0 is false.

By the end of the sixth grade, a student (according to California's content standards) can write a brief essay on how the Law of Trichotomy applies to the gods. He or she knows how to consult a dictionary,[21] and see that:

**Religion** is "the service and worship of God or the supernatural.[22]"

**Religious** means "relating to or manifesting faithful devotion to an acknowledged ultimate reality or deity.[23]"

**Belief** is "a state or habit of mind in which trust or confidence is placed in some person or thing.[24]"

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[21] *English–Language Arts Content Standards for California Public Schools,* page 16 (1997)

[22] Webster's Collegiate Dictionary p. 988 (10th ed. 1994)

[23] Webster's Collegiate Dictionary p. 988 (10th ed. 1994)

[24] Webster's Collegiate Dictionary p. 104 (10th ed. 1994)



A child can tell you that much. By sixth grade, a child can tell you that atheism is one belief, that monotheism is another, that polytheism is yet another, and that the three are mutually exclusive. By the time a student is ready to graduate an EGUSD high school, he or she can write an essay on whether this court should rule in favor of Respondent or Petitioner in this case.[25]

But the U.S. argues that the current version of the Pledge does not endorse a religious belief, nor is it a "profession of a religious belief."[26]

By the time a student in EGUSD is ready to go on to middle school, he or she can tell you that P0 is not consistent with the Pledge, and that the Pledge asserts P1. But the U.S. argues that, "There is no reasonable basis for perceiving such religious endorsement in the Pledge."[27]

Petitioner EGUSD makes some interesting claims in this regard. In its Petition for a Writ of Certiorari, it claims that, adding "the phrase 'under God' to the Pledge was done for a secular purpose – the affirmation of the concept that the United States was founded on a fundamental belief in God."[28] But it also claims that it is wrong to presume "that the Pledge takes a position with respect to the existence of God."[29] One wonders: how is the Petitioner going to explain *that* to its students?

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[25] On 4 February 2004, the *Sacramento Bee* published essays by Ai Nhi Hoang and Amanda Everett, students in the EGUSD, on how this court should decide this case.

[26] U.S. brief, page 5

[27] U.S. brief, page 39

[28] Petition for a Writ of Certiorari, page 13 (13 November 2003)

[29] Petition for a Writ of Certiorari, page 12 (13 November 2003)

## The Why of It

The U.S. asks this court to consider the intent behind the 1954 statute[30] that added 'under God' to the Pledge. It claims the intent was not to promote a religious belief, but to "officially acknowledge the religious heritage, foundation and character of this Nation."[31] It asks the court to examine the legislative record for intent.

What does the record show? It shows that Congress was concerned about an Establishment Clause challenge to the statute, and so it turned to two previous Supreme Court decisions to allay that concern. It quoted one decision in which the court claimed that the U.S. is "a religious nation." (citing *Holy Trinity Church v. United States,* 143 U.S. 457, 470 (1892)) It quoted another claiming that, "We are a religious people whose institutions presuppose a Supreme Being." (citing *Zorach v. Clauson,* 343 U.S. 306, 313)

What the record fails to mention is that in *Zorach v. Clauson,* in the same paragraph as the one cited, is this statement: "The government must be *neutral* when it comes to competition between sects." *Zorach v. Clauson* 343 U.S. 306, 314 (emphasis added) The record fails to mention that in *Holy Trinity*, this was said: "If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. . . . this is a Christian nation." *Holy Trinity Church v. U.S.,* 143 U.S. 457, 471

[30] Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249

[31] U.S. brief, page 8



The U.S. also asks this court to consider the writings and speeches of former presidents: Washington and Jefferson and Madison. The U.S. says *if* you examine their words, *then* you'll see that these men believed in God. This nation "was founded by individuals who believed in God."[32]

That's beside the point. How are the Founders' religious beliefs relevant here? When it comes to other matters, we don't ask for the Founders' beliefs about women, children, and slaves. Why should we ask for their religious beliefs in this matter? What's controlling here, what a dead president revealed in a speech, or the Constitution he signed?

If the U.S. can demonstrate that the current version of the Pledge *doesn't* endorse a religious belief, then the matter is settled. But it's not reasonable to say that the Founders believed in God, and then to say that the Pledge doesn't endorse that belief, or that it's not a religious belief. That it is a religious belief is precisely the point.

Suppose this. Suppose Congress passed a law intended to promote chastity, and the effect of the law in EGUSD was that all girls must wear veils, beginning in the 7th grade. Noble intent. Does the intent justify the intrusion? Suppose the legislative record contained assurances that the law didn't violate the Constitution and wasn't motivated by the teachings of the Koran. Suppose the law said any girl could be excused from wearing a veil *if* her parents give their consent. Only willing students are required to conform. Would that make it OK?

[32] U.S. brief, page 33

When Congress looked to Supreme Court decisions to find protection from an Establishment Clause challenge to the 1954 statute, it found what it wanted. According to the record, "The Supreme Court has clearly indicated that the references to the Almighty which run through our law, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (Zorach v. Clauson (343 U.S. 306, 312-313, 72 S.Ct. 679))."[33]

In *Zorach*, by positing **the Almighty,** the court revealed what it believed: God exists. In *Engel v. Vitale*, Justice Stewart noted that, "At the opening of each day's Session of this Court we stand, while one of our officials invokes the protection of God." *Engel v. Vitale* 370 U.S. 421, 446 (1962) Does the court regularly turn to a god that doesn't exist for protection? No. Does it turn to a family of gods for protection? No. The court regularly turns to the god that this nation's Founders turned to and believed in. Not some nameless, faceless god, but a particular god. If the nation's Founders were Christians, they believed in a particular god.

Why? Why should the court assert P1? It's a given, and appointment to this court depends on it. No one who has been appointed to this court has denied P1.[34] Article VI of the Constitution says, "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Public opinion says the President would do well not to appoint judges who hold P0 or P2.[35] [36]

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[33] H.R. Rep. No. 83-1693 at 3 (1954), reprinted in U.S.C.C.A.N. 2341-42

[34] See http://www.adherents.com/adh_sc.html; listing the religious affiliations of all Supreme Court Justices. The only justice *not* to profess adherence to a religion based on P1 was Justice David Davis, who was appointed to the Supreme Court by President Lincoln in 1862

[35] *Religion and Politics: the Ambivalent Majority*, Pew Forum on Religion & Public Life (20 September 2000) "Just 32% [of American voters] hold a favorable opinion of atheists."
See http://people-press.org/reports/display.php3?ReportID=32



The official belief of the U.S. is P1, and this incident reveals it. Just after the appeals court issued its ruling in *Newdow I*,[37] President Bush indicated that only those who hold certain religious beliefs could be appointed to the federal bench. "There is a universal God," said the president. "The declaration of God in the Pledge of Allegiance doesn't violate rights. As a matter of fact, it's a confirmation of the fact that we received our rights from God, as proclaimed in our Declaration of Independence."[38]

The President made it quite clear: "We need common-sense judges who understand that our rights were derived from God. Those are the kinds of judges I intend to put on the bench." *Id.*

According to this, it wouldn't matter how well qualified Michael Newdow might be to become a federal judge. Nothing else would matter. If Newdow was an atheist, then he could not become a federal judge, no matter what the Constitution says.

On a similar note, an earlier President Bush is quoted as having said this (in 1987) about atheists: "I don't know that atheists should be regarded as citizens, nor should they be regarded as patriotic. This is one nation under God."[39]

These comments reveal, to any reasonable observer, what atheists well know: they're second-class citizens.

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[36] *Religion and Politics: Contention and Consensus*, Pew Forum on Religion & Public Life (24 July 2003) "But fully half say they would not vote for a well-qualified atheist."
See http://pewforum.org/publications/surveys/religion-politics.pdf

[37] *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002)

[38] See *USA Today*, 27 June 2002, Bush calls pledge ruling 'out of step'

[39] As reported by journalist Rob Sherman.
See http://www.robsherman.com/information/liberalnews/2002/0303.htm

## Things that Divide Us

In *Zorach*, the court described the U.S. as a place where the government shows "no partiality to any one group." *Zorach v. Clauson* 343 U.S. 306, 313 It said the government must be "neutral when it comes to competition between sects." *Zorach v. Clauson* 343 U.S. 306, 314

Since *Zorach*, there have been a number of Establishment Clause cases in which this court has considered whether governmental actions were "sectarian" or "secular." In *Allegheny*, the court considered the "constitutionality of nonsectarian references to religion by the government," and contrasted them with "practices that demonstrate the government's allegiance to a particular sect or creed." *Allegheny v. ACLU* 492 U.S. 573, 574

The current version of the Pledge demonstrates the government's allegiance to a particular sect and to a particular creed.

What is a *creed?* It is this: "a set of fundamental beliefs."[40]

What is a *sect?* It is this: "a group adhering to a distinctive doctrine or to a leader."[41]

What is *sectarian?* It means this: "of, or relating to, or characteristic of a sect."[42]

P1 is sectarian; it is part of a creed. Those who hold P1 belong to one sect; they are monotheists. Those who hold P0 belong to another sect; they are atheists. Likewise for those who hold P2; they are polytheists. These are three separate sects with three different creeds. A child can tell you as much.

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[40] Webster's Collegiate Dictionary p. 273 (10th ed. 1994)

[41] Webster's Collegiate Dictionary p. 1056 (10th ed. 1994)

[42] Webster's Collegiate Dictionary p. 1056 (10th ed. 1994)



The current version of the Pledge – asserting P1 – is sectarian. It is appropriate only for those who hold P1. To those who hold P0, the current version of the Pledge asserts a false belief. Likewise for those who hold P2.

To claim that this is *one nation under God* is not a religious belief, or that it is not sectarian, is to fail to call it what it is. It is a belief central to Christianity, Islam, and Judaism. It is not shared by atheists, nor by agnostics, nor by Deists, nor by Hindus. A spade is a spade.

## Things that Keep Us Together

Since *Zorach*, this court has often considered neutrality when deciding Establishment Clause cases:

"[The First] Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers." *Everson v. Board of Education* 330 U.S. 1, 18 (1947) (emphasis added)

"[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization . . . ." *County of Allegheny v. ACLU* 492 U.S. 573, 590 (1989)

"[T]he prohibition against governmental endorsement of religion preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny v. ACLU* 492 U.S. 573, 593 (1989)

"The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . ." *County of Allegheny v. ACLU* 492 U.S. 573, 593 (1989)

"[G]overnment may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)" *County of Allegheny v. ACLU* 492 U.S. 573, 604 (1989)

"*Lynch v. Donnelly* confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs." *County of Allegheny v. ACLU,* 492 U.S. 573, 621 (1989)

"[This court] has consistently held that the [establishment] clause withdrew all legislative power respecting religious belief or the expression thereof." *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 222 (1963)

"In the relationship between man and religion, the State is firmly committed to a position of neutrality." *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 226 (1963)

The one justice who dissented in *Abington* agreed that the First Amendment requires neutrality, the "evenhanded treatment of all who believe, doubt, or disbelieve," *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 317 (1963) and the court rejected the idea that the concept of neutrality "collides with the majority's right to free exercise of religion." *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 226 (1963) And in *Zelman*, the court found a school voucher program Constitutional since, "It is neutral in all respects towards religion." *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002)

Is the Pledge neutral towards religion? Of course not, not when it asserts a controversial religious belief (i.e., that this nation is 'under God.')



## Much Ado about Something

The U.S. argues that "Reciting the Pledge or listening to others recite it is a patriotic exercise. It is not a religious exercise at all . . . ."[43] That would certainly be true of the pre-1954 version of the Pledge. But reciting the current version of the Pledge requires one to assert a religious belief: that this is *one nation under God.* Implicit in that assertion is belief in one, particular god: the god that George Washington referred to in his inaugural address (*that Almighty Being who rules over the universe*), the god that Abraham Lincoln referred to in the Gettysburg Address. The very god that told its adherents that they must not honor other gods.[44] (Or, is there any question that presidents Washington and Lincoln were other than monotheists?)

The belief that there is one god: *that* is a religious belief. It is a controversial belief. To say otherwise is to say the matter is settled and there is no dispute about it. That may be true in some quarters, but in others, the existence of the gods, how many there are, whether they care about worldly affairs . . . those matters are the source of great debate.

This court may not see the controversy. None of its members have argued that the crier's call, "may God save this honorable court," is an affront to his or her beliefs. And there's a reason for that: if you don't agree that God exists, you don't get appointed to this court.

P1 is not controversial when it's said here, in this court, nor is it controversial when it's said in a mosque on Friday, or a synagogue on Saturday, or a church on Sunday.

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[43] U.S. brief, page 45

[44] King James Version of the Bible, Exodus 20:3, "Thou shalt have no other gods before me."

P1 is widely held. Polls consistently show that close to 9 out of every 10 of us hold it. Given its popularity, you might associate only with those who share the belief with you, and you might not be able to fully appreciate just how controversial it is.

Address the annual convention of the National Academy of Science and say there's one god. You're certain to see that the belief that there is one god is controversial. Polls show that more than half of our nation's scientist do not hold P1, and so you said something that most of the conventioneers would disagree with. Address the science academy and say there's one god. That's controversial. If people were asked about what you said, some (40%) would say they agree with you, and some (60%) would say they don't.[45]

## Turning the Tables

What happens if we turn the tables? What happens to all the arguments presented by the U.S. in the instant case when the situation is reversed? What happens when it's the Catholic parents of public school children complaining about a version of the Pledge that is consistent with, or endorses, P2? Imagine a school where the teachers lead "willing students" in reciting the Hindu version of the Pledge, which refers to this as a *one nation under the gods.* What happens when the Catholic parents of a student at that school turn to the courts to put an end to the practice because it violates *their* rights to raise their daughter as they see fit, without interference from the state when it comes to her religious upbringing?

[45] See "Scientists and Religion in America" *Scientific American,* September 1999, "Whereas 90% of the general population has a distinct belief in a personal god and a life after death, only 40% of scientists on the B.S. level favor this belief in religion . . . ."



And they do see it as interference. It's not hard to see it that way. You don't need to be a trained child psychologist to understand the effect of repeatedly reminding a child to say *please* and *thank you.* The effect is to make saying *please* and *thank you* reflexive: automatic.

You don't need to be a child psychologist to know how this type of training works. Being a parent is more than sufficient; a grade-school teacher will do.

Any good Catholic parent or teacher can answer this question: what's the effect of having a child – beginning at age five – recite a pledge day after day, year after year, that says there are many gods? Does such repetition have an effect on the young and impressionable?

You bet it does, and that's what concerns our Catholic parents. From their perspective, the school is teaching their daughter something that goes right against their religious beliefs: God exists, and there is just one god. The school has no right to teach the girl otherwise, does it?

According to *Census 2000,*[46] less than half the people in California can relate to the Founding Fathers in a particular way: by ethnicity.[47] Less than half the people in California are *European-Americans.* Over 25% of all those now living in California were born outside of the U.S.[48] And over 10% of those living in California are classified as Asian.

[46] U.S. Census Bureau

[47] U.S. Census Bureau, *Census 2000 Redistricting Data Summary File,* Matrices PL1, PL2, PL3, and PL4. Of the total population of California (33,871,648), those classifed as 'White' (15,816,790) account for 46.7% of the total.

[48] http://factfinder.census.gov; According to *Census 2000,* 26.2% of those living in California were classified as 'Foreign Born.'

The distribution of Asians in California is uneven. In Monterey, less than 10% of the population is Asian,[49] but in Monterey Park, well over half the population is Asian.[50]

The distribution of Asians among public school students follows suit. At Galileo High School in San Francisco, well over half the students are Asian,[51] but at Balboa High School in San Francisco, only 20% of the students are Asian.[52] In EGUSD, nearly 20% of the students are Asian.[53]

And the fastest growing ethnic group in all of California: Asian Indians:[54] Hindus:[55] adherents to this world's third-largest religious denomination.[56]

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[49] http://factfinder.census.gov; According to *Census 2000,* 7.4% of those living in Monterey, California were classified as 'Asian.'

[50] http://factfinder.census.gov; According to *Census 2000,* 61.8% of those living in Monterey Park, California were classified as 'Asian.'

[51] http://orb.sfusd.edu/sarcs2/sarc-559.pdf; According to the California State Department of Education School Accountability Report Card for School Year 2001 – 2002, 63.2% of students were classified as 'Asian.'

[52] http://orb.sfusd.edu/sarcs2/sarc-439.pdf; According to the California State Department of Education School Accountability Report Card for School Year 2001 – 2002, 20.8% of students were classified as 'Asian.'

[53] http://www.egusd.k12.ca.us/district/demo.htm; According to EGUSD, 18.9% of its students are classified as 'Asian.'

[54] http://www.stanford.edu/dept/csre/PUBL_demRep.htm; According to *Asians in California: 1990 to 2000* No. 8, April 2002, Figure 3, page 7, the Asians with the greatest rate of growth in California were Asian-Indians.

[55] http://www.adherents.com/largecom/com_hindu.html; 79% of Asian-Indians are Hindu. Hindus are to India what Christians are to the U.S.

[56] http://www.adherents.com/Religions_By_Adherents.html; Hinduism is the world's third largest religion (after Christianity and Islam).



It is not hard to imagine this: there's a school in California where most of the teachers and most of the students are Hindu. Some of the students are uncomfortable with the Pledge because, as they see it, it says there's only one god. So, the school adopts this policy: each morning, the students who want to say the Hindu version of the Pledge go to the auditorium and pledge their allegiance to the flag of *one nation under the gods;* the other students stay in their classrooms and pledge their allegiance to the flag of *one nation under God.* Seems fair.

The Catholic parents of a school girl don't see it that way. Each morning, almost all the students go to the auditorium and recite their pledge, but their daughter stays in her classroom all alone because she objects (and her parents object) to the Hindu version.

It's not hard to imagine a good community of Hindus wanting their children to recite a version of the Pledge in keeping with *their* traditions. There's nothing in the California law[57] that prohibits teachers from leading willing students in a different version of the Pledge. But the Catholic parents are disgruntled, and they take the issue to court. They argue that there is something unconstitutional about this arrangement; their daughter is being treated unfairly because she belongs (like her parents) to a religious minority. This must certainly be some violation of the First Amendment.

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[57] Cal. Educ. Code § 52720 (West 1976).

Like the instant case, this imaginary case of the Catholic girl and the Hindu pledge makes its way to this court, and this court is asked to decide whether the school is violating the rights of Catholics. Is the school endorsing a religious belief? Is the Catholic girl being treated like an outsider, or a second-rate citizen, because of her religious beliefs? Is she being coerced? Is she confronted with the options of silent assent or protest?

Imagine that situation. And imagine how the U.S. could argue in that case. If it argues as it has in the instant case, it will support the school, not the Catholics.

According to the U.S., reciting the Pledge is not "a religious exercise."[58] According to the U.S., "Reciting the Pledge or listening to others recite it is a patriotic exercise. It is not a religious exercise at all, let alone a core component of worship like prayer."[59]

According to the U.S., the Pledge is certainly not a prayer. "[D]escribing the Republic as a Nation [under the gods] is not the functional equivalent of prayer. No communication with or call upon [the gods] is attempted. The phrase is not addressed to [the gods] or a call for [Their] presence, guidance, or intervention."[60]

Perhaps the Catholics are being unreasonable. According to the U.S., "A reasonable observer . . . would understand that the reference to [the gods] is not an approbation of [polytheism]."[61]

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[58] U.S. brief, page 44

[59] U.S. brief, page 45

[60] U.S. brief, page 43

[61] U.S. brief, page 43



And if Catholics believe that what the school is doing endorses polytheism, the U.S. can assure them that "There is no reasonable basis for perceiving such religious endorsement in the Pledge. The Pledge is not a 'profession of a religious belief, but a statement of allegiance and loyalty to the Flag . . . . '"[62]

Besides, it's not as if their daughter *had* to recite the Hindu pledge. The Hindu children go to the auditorium to recite their version of the Pledge, so the Catholic girl doesn't even have to hear it. But, suppose she did. Suppose the school's policy was that all students remain in their classrooms during recitation of the Pledge, the Hindu version of the Pledge. The girl doesn't *have* to say it.

The Catholics have little to complain about if their child is not *required* to recite the Hindu version of the Pledge because, "quiet acquiescence in the practice"[63] would not exact a toll on her conscience, nor would her failure to recite the Pledge "put her at odds"[64] with her peers or school officials. In fact, such concerns have "little relevance,"[65] says the U.S.

The Catholic girl's daily exposure to the Pledge, says the U.S., "does not constitute teaching, indoctrination, opposition or promotion of * * * any particular value or religion."[66] The reference to *the gods* in the Pledge "is not reasonably and objectively understood as endorsing . . . any particular religious doctrine."[67]

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[62] U.S. brief, page 39

[63] U.S. brief, page 45

[64] U.S. brief, page 45

[65] U.S. brief, page 45

[66] U.S. brief, page 45

[67] U.S. brief, page 32

Perhaps the Catholics just don't understand the Pledge and what it means. "It is true that the Pledge is a "declar[ation] [of ] a belief," Barnette, 319 U.S. at 631, but the belief declared is not [polytheism]; it is a belief in allegiance and loyalty to the United States Flag and the Republic that it represents."[68]

Of course, the girl "might feel uncomfortable" hearing her teacher and her classmates recite a Pledge at odds with her religious beliefs, but that's OK. Her refusal to recite the Pledge will have no impact on her "standing in the political community."[69]

And if the court were to rule the school's policy unconstitutional, then, according to the U.S., "that would bespeak a level of hostility to religion that is antithetical to the very purpose of the Establishment Clause."[70] Besides, the school has not "so intruded itself into religious matters as to pressure or intimidate schoolchildren into violating the demands of conscience."[71]

The Catholic girl is not being coerced. The government has not become "pervasively involved in or effectively coerced a religious exercise."[72] The school is not telling her that she can't be a good Catholic and believe in one, three-part god. And there's plenty to reassure her (and her Hindu classmates) that the government really believes in God. Says the U.S. of the school's Pledge policy: "petitioners' Pledge policy has no more coercive effect than the use of currency that bears the National Motto 'In God we trust.'"[73]

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[68] U.S. brief, page 39

[69] U.S. brief, page 45

[70] U.S. brief, page 46

[71] U.S. brief, page 45

[72] U.S. brief, page 44

[73] U.S. brief, page 46



"Finally, the public schools cannot perform their job of educating the next generation of citizens and teaching those values that are 'essential to a democratic society,' Bethel, 478 U.S. at 681, if they have to expunge all pedagogical 'exercise[s] with religious content.'"[74]

And "[i]f we are to eliminate everything that is objectionable" to these Catholics "or inconsistent with any of *their* doctrines, we will leave public education in shreds."[75]

According to the U.S., the Catholics don't have much of a case, because the bottom line is just this: "Recitation of the Pledge by willing students . . . comports with the Establishment Clause."[76]

If I'm a student in EGUSD, if I'm ten years old and my parents are Hindu and they're teaching me that there are many gods, and I've heard many stories about the gods – about Lord Ram and Lord Vishnu and Lord Krishna and Lord Brahma and the demon Naraka – and we go to religious festivities several times a year, and part of what I believe is that the gods don't align themselves with nations because that's what I've been taught, then the Pledge contradicts what I believe. It contains a lie.

I can agree to it in every other way but one: the religious belief it asserts. By the time I complete sixth grade, I know that I don't agree with the current version of the Pledge. It is a lie, I'm quite certain of it, and I really don't appreciate it.

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[74] U.S. brief, page 46

[75] U.S. brief, page 47

[76] U.S. brief, page 48

If a misguided sense of patriotism (fearful of others and *their* way of life) inspired Congress to add *under God* to the Pledge in 1954, then something similar happened when the World Trade Center was attacked in 2001. Since then, a number of states have passed laws *requiring* the Pledge to be recited in public schools. According to many of those laws, teachers and willing students *must* recite the Pledge.[77] [78] That's the law.

*If* this court decides that it is no violation of the Establishment Clause for public school teachers to lead willing students in the current version of the Pledge, *then* how will some future court decide that the Catholics are justified in claiming that the school their daughter attends is violating their rights?

[77] On 28 May 2003, Governor Rick Perry signed into law S.B. 83, which amends Section 25.082 of the Texas Education Code. The amended code requires that "The board of trustees of each school district shall require students, once during each school day at each school in the district, to recite: (1) the pledge of allegiance to the United States flag in accordance with 4 U.S.C. Section 4 . . . ."

[78] On 3 June 2003, Governor Bill Owens signed H.B. 03-1368. Colorado Revised Statute § 22-1-106(2)(a), which took effect on August 7, 2003, states that, "The teacher and students in each classroom in each public high school in the state of Colorado shall recite alound the Pledge of Allegiance . . . ."



## Conclusion

One person believes there is one god. Another believes there are no gods. Another believes there are many gods, and yet another believes there is just one god but that it does not concern itself with worldly affairs (e.g., it does not prefer the U.S. over other nations). Would a reasonable observer conclude that the government is neutral when it sides with the one person, when it enshrines that person's belief in an official creed and then mandates that the belief be recited in public school every morning, regardless of what the school children or their parents believe?

During the Viet Nam war, members of the Armed Forces had to choose from a seletion of religions. Your selection was impressed on the your dog tags. If you didn't select something consistent with P1, your dog tag was imressed like this – *No Pref* – meaning you had no religious preference. And, for many, that was a lie.

Atheists and agnostics and polytheists and others are often confronted with an official lie – that this is a nation *under God* – and there's really no need for it at all, certainly not at school.